

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CRYSTAL IRISH

Appellant

v.

GEORGE IRISH

Appellee

C.A. Nos. 09CA009577
 09CA009578

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 03DU062121

DECISION AND JOURNAL ENTRY

Dated: February 8, 2010

BELFANCE, Judge.

{¶1} Plaintiff-Appellant, Crystal Irish has appealed the judgment of the trial court dated April 2, 2009 denying her motion to modify child support and the judgment of the trial court dated April 17, 2009 denying her motion to vacate the judgment entered on May 20, 2008. For the following reasons, we reverse and remand.

FACTS

{¶2} Plaintiff-Appellant, Crystal Irish (“Mother”) and Defendant-Appellee, George Irish, Jr. (“Father”) were granted an uncontested divorce on April 2, 2004. The parties have three unemancipated children. Pursuant to the decree of divorce, the trial court adopted a shared parenting plan and, subject to further order of the court, no child support was ordered to be paid to either party. The reasons stated in the divorce decree for the nonpayment of child support included, the parties’ equal possession time with the children, Father’s obligation to pay the cost

of tuition, and the Father's additional financial contributions. At the time of the divorce, Father earned \$42,000 and Mother earned \$37,500.

{¶3} On June 20, 2007, Father filed a motion to terminate shared parenting and for custody. Father's motion was resolved by agreement of the parties on May 20, 2008. Pursuant to this agreement, the parties altered their possession schedule to a rotating two-month schedule during the school year and alternating weeks during the summer. In addition, the parties agreed that Father would pay Mother \$158.14 in monthly child support which represented an 80% deviation from the child support guidelines. Father's annual income was \$45,054 and Mother's was \$26,000. All matters resolved by the parties were subject to further order of the court.

{¶4} Several months later, Mother filed a motion for contempt in which she alleged that Father had failed to pay the child support as agreed and had failed to perform other financial obligations. On September 5, 2008, Mother filed a motion to modify child support and for clarification of ambiguities in the parties' shared parenting plan. In her motion, Mother alleged that there had been a change in circumstances and that a deviation from the child support guidelines was no longer appropriate. While Mother's motion was pending and prior to the hearing before the magistrate, Mother lost her employment. At the time of the hearing, Mother was receiving unemployment compensation in the amount of \$187 per week and Father's earnings had increased from \$45,054 to \$51,000.

{¶5} Upon consideration of the evidence, the magistrate found the requisite 10% variance pursuant to R.C. 3119.79 to demonstrate a change in circumstances. Pursuant to the child support guidelines, the magistrate determined Father's support obligation was \$919.31 per month. However, although Mother had demonstrated a change in circumstances, the Magistrate determined that because the parties had previously agreed to an 80% deviation in child support,

Mother's substantial change in her economic situation was nonetheless not a *legally relevant* change in circumstances. Accordingly, the magistrate applied an 80% deviation to the applicable guideline support. As a result of the application of an 80% deviation, Father's child support obligation was reduced to \$183.87 per month. The trial court affirmed the magistrate's decision.

{¶6} On January 26, 2009, Mother filed a motion pursuant to Civil Rule 60(B) to vacate the May 20, 2008 judgment. The trial court overruled Mother's motion. Mother appealed both the judgment as to child support and the judgment overruling her Civ.R. 60(B) motion. The appeals were consolidated for our review.

IMPUTATION OF INCOME

{¶7} In her first assignment of error, Mother contends that the trial court erred in imputing income to her when it ruled on her motion to modify child support. We agree.

{¶8} Generally, we review an order addressing child support for an abuse of discretion. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. "In so doing, we consider the trial court's action with reference to the nature of the underlying matter." *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18.

{¶9} A trial court may impute income to a parent for purposes of calculating child support if it first makes the required finding that the parent to whom income is imputed is either voluntarily unemployed or voluntarily underemployed. *Misleh v. Badwan*, 9th Dist. No. 24693, 2009-Ohio-6949, at ¶7. See, also, *Ramskogler v. Falkner*, 9th Dist. No. 22886, 2006-Ohio-1556, at ¶13. (stating that the Supreme Court of Ohio has determined that R.C. 3119.01 must be complied with literally and further holding that the trial court must explicitly make a finding of voluntary un- or underemployment before imputing income). Thus, as our cases hold that the trial court is required to explicitly make a finding of voluntary under- or unemployment, if the

trial court does not make that finding, it has incorrectly applied the law. Our review of the trial court's application of the law is de novo. *In re V.S.*, 9th Dist. No. 22632, 2005-Ohio-6324, at ¶6.

{¶10} Here, the magistrate stated that she “considers [Mother] to be voluntarily unemployed[.]” However, the trial court found “[t]hat the Magistrate did not err in finding [Mother] to be voluntarily underemployed[.]” While the implication of the trial court's statement is that it is finding Mother to be voluntarily underemployed, the statement nonetheless falls short of the explicit finding required by this Court's jurisprudence. See, e.g., *Misleh v. Badwan*, 9th Dist. No. 24185, 2009-Ohio-842, at ¶¶6-8; *Musci v. Musci*, 9th Dist. No. 23088, 2006-Ohio-5882, at ¶17. A statement that the magistrate did not commit a legal error is not equivalent to making a specific factual finding. *Musci* at ¶17. Accordingly, we determine that the trial court committed reversible error because it incorrectly applied the law when it failed to make the express finding that Mother was voluntarily unemployed. Mother's first assignment of error is sustained.

DEVIATION FROM CHILD SUPPORT GUIDELINES

{¶11} Mother argues in her second assignment of error that upon recalculating the amount of child support due, the trial court erred in deviating 80% from the child support guidelines. We agree.

{¶12} As above, we generally review the trial court's decision concerning child support for an abuse of discretion, *Booth*, 44 Ohio St.3d at 144, though we examine the trial court's determination with reference to the nature of the underlying matter. *Tabatabai* at ¶18. When modifying an existing child support order, the trial court must complete a child support worksheet and schedule. R.C. 3119.79(A). The resulting support obligation is rebuttably presumed correct. R.C. 3119.03. The trial court may enter a final support order that deviates

from the amount as calculated in the worksheet and schedule if the trial court: (1) finds that the amount calculated is unjust or inappropriate; (2) finds that the amount calculated does not conform to the child's best interest, and; (3) states findings of fact supporting the deviation from the amount calculated. (Citations omitted.) *Maiorana v. Maiorana*, 9th Dist. No. 08CA0016-M, 2008-Ohio-6179, at ¶7. The trial court must consider the following factors when it determines whether deviation is appropriate:

“(A) Special and unusual needs of the children;

“(B) Extraordinary obligations for minor children or obligations for handicapped children who are not stepchildren and who are not offspring from the marriage or relationship that is the basis of the immediate child support determination;

“(C) Other court-ordered payments;

“(D) Extended parenting time or extraordinary costs associated with parenting time, provided that this division does not authorize and shall not be construed as authorizing any deviation from the schedule and the applicable worksheet, through the line establishing the actual annual obligation, or any escrowing, impoundment, or withholding of child support because of a denial of or interference with a right of parenting time granted by court order;

“(E) The obligor obtaining additional employment after a child support order is issued in order to support a second family;

“(F) The financial resources and the earning ability of the child;

“(G) Disparity in income between parties or households;

“(H) Benefits that either parent receives from remarriage or sharing living expenses with another person;

“(I) The amount of federal, state, and local taxes actually paid or estimated to be paid by a parent or both of the parents;

“(J) Significant in-kind contributions from a parent, including, but not limited to, direct payment for lessons, sports equipment, schooling, or clothing;

“(K) The relative financial resources, other assets and resources, and needs of each parent;

“(L) The standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued or had the parents been married;

“(M) The physical and emotional condition and needs of the child;

“(N) The need and capacity of the child for an education and the educational opportunities that would have been available to the child had the circumstances requiring a court order for support not arisen;

“(O) The responsibility of each parent for the support of others;

“(P) Any other relevant factor.” R.C. 3119.23.

The trial court has discretion when considering the evidence presented relative to the above statutory factors. However, because the trial court does not have the discretion to ignore those factors, it commits an error of law if it fails to consider the factors enumerated in R.C. 3119.23 for which evidence has been presented at trial.

{¶13} After determining that there was a change in circumstances warranting a modification of child support and the revised amount of child support payable to Mother pursuant to the child support guidelines, the court was then required to consider the above statutory factors in determining whether deviation from the presumptive guideline support was appropriate. R.C. 3119.22. However, in our review of the record, while there was evidence presented pertaining to many of the financial factors expressly contained in the statute, it is apparent that the magistrate and the trial court essentially found that the prior agreement to deviate was determinative of whether deviation was appropriate rather than considering the matter anew in light of all of the relevant statutory factors. Significantly, the magistrate concluded that the only “legally relevant” circumstance requiring re-evaluation of the 80% deviation would be a change in parenting time. The magistrate reasoned that because the parties had based the deviation upon Father’s extended parenting time and the parties’ parenting time

had not changed¹, it would be “clearly unjust, unfair, and not in the best interests of the children” to eliminate the 80% downward deviation. The trial court determined “[t]hat the Magistrate did not err in finding that the near eighty (80) percent downward deviation remains applicable due to the fact that no change in parenting time exists between the May 20, 2008 agreed journal entry and the present.” The trial court also found that “the Magistrate did not err in finding that the extended parenting time exercised by father continues and that it would be unjust, unfair, and not in the best interests of the children to not deviate from the child support worksheet guidelines.”

{¶14} The record reflects that evidence was offered concerning numerous statutory considerations, including: (1) extended parenting time or extraordinary costs associated with parenting time; (2) disparity in income between parties or households; (3) benefits that either parent receives from remarriage or sharing living expenses with another person; (4) significant in-kind contributions from a parent; (5) the relative financial resources, other assets and resources, and needs of each parent; (6) the standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued or had the parents been married. See R.C. 3119.23(D), (G)-(H), (J)-(L).

{¶15} Mother provided un rebutted evidence that she had lost her job and was receiving unemployment compensation. Pursuant to the child support guideline worksheet, Mother’s annual unemployment income placed her at the federal poverty level. By contrast, Father’s income had increased. In addition, Father had remarried and his spouse was also employed and

¹ At the hearing, there was no testimony that Mother had agreed to the deviation solely because she and Father had roughly equal parenting time. We thus question the reasoning of the trial court with respect to its suggestion that Mother’s agreement to deviate was based *solely* on equal parenting time, as it is clear that Mother agreed to the deviation at a point in time when she was fully employed.

receiving child support for her child from a prior marriage. Notwithstanding the evidence presented related to many of the above factors, the court below determined that it was appropriate to center its analysis on the fact that the parties had previously agreed to a child support deviation in 2008 and that the children spend equal if not more time with Father. It concluded that it was in the minor children's best interest "to maintain the integrity of the parties' agreement" and thus to deviate to the same extent as previously agreed.

{¶16} Although extended parenting time is one factor that the trial court must consider in evaluating whether guideline support is unjust, inappropriate, and not in the children's best interest, we conclude that the trial court's reasoning was flawed. Instead of considering extended parenting time in conjunction with the other enumerated factors, the trial court focused upon the parties' *prior agreement to deviate*, in essence finding that because the parties had a prior agreement to deviate that was purportedly based upon equalized parenting time, it should hold the parties to their agreement. However, in focusing on the parties' prior agreement and prior circumstances, the trial court failed to consider the parties' *present* circumstances in conjunction with the statutory factors. Whether the parties have a prior contractual obligation to deviate is not among the specific factors set forth in R.C. 3119.23. As is evident by the factors enumerated in the statute, the inquiry is not whether it is fair to hold parties to a *prior* bargain; rather, the inquiry requires the court to evaluate all of the factors in light of the current circumstances of the parties. Thus, notwithstanding a prior agreement that took into account extended parenting time, in determining whether to deviate from the presumptive guideline support, extended parenting time was only one of many factors that the trial court was required to consider in evaluating the parties current circumstances. See R.C. 3119.23(A)-(P). Here, the trial court essentially focused on the parties' prior agreement as being determinative of whether deviation was appropriate,

notwithstanding the fact that Mother was living at poverty level and unable to meet the children's needs and Father arguably had sufficient income to meet his needs. Further, many of the enumerated factors concern the relative financial circumstances of the parties and the needs of the children, thereby evidencing legislative intent to comprehensively consider the relative financial and economic situation of the parties. R.C. 3119.23(D)-(L), (O). For example, the statute requires the trial court to consider the physical needs of the children and the standard of living of each parent and the standard of living the children would have enjoyed had the marriage continued. R.C. 3119.23(M), (L). In the case at bar, it does not appear that the court gave due consideration to all of the relevant financial factors expressly enumerated in the statute. The record reflects a striking difference between Mother's financial circumstances at the time of the May 2008 agreement and her financial situation at the time of the hearing, as well as a striking difference between Mother and Father's incomes at the time of the hearing. Further, there was evidence that Mother was not able to adequately meet the needs of the children while in her home and that she was incurring credit card debt to subsist.

{¶17} We acknowledge that in addition to the primary emphasis upon the parties' prior agreement to deviate, the trial court made reference to additional expenses incurred by the Father. While these expenses can appropriately factor into the court's analysis, we find that the court considered the prior deviation agreement and Father's expenses to the exclusion of other specifically enumerated factors for which evidence was produced at trial. We further observe that the evidence adduced at the hearing revealed that *both* Mother and Father were making additional financial contributions to the children such as the purchase of uniforms or payment of extracurricular activities. For example, Mother testified that she had paid or would be paying fees for basketball, Cub Scouts, and band. Father also testified that he has paid some amounts

for school field trips and Cub Scouts. Further, there was no evidence that Father was making any additional contribution to tuition for preschool, as was the case when the parties initially executed their separation agreement. Father did have an additional monthly expense of \$138 for eighteen months after an initial down payment of \$1070 for orthodontia, which he was obligated to pay pursuant to the parties' shared parenting plan. In addition, because Father had remarried and elected to provide his spouse with medical insurance coverage there was no additional cost to cover the children. Father estimated that his monthly out-of-pocket expenses for the children's healthcare were \$75. Thus, although there was consideration of Father's additional expenditures, we find that the trial court did not evaluate that factor along with the other factors it was required to consider as made relevant by the evidence.

{¶18} We emphasize that absent a request for findings of fact and conclusions of law, we are not suggesting that a trial court must separately discuss each statutory factor in its judgment entry; nor must it address those for which no evidence is adduced at the hearing. However, the language of the judgment entry in this case indicates that the trial court focused almost solely on the parties' prior agreement to deviate from the child support guidelines to the exclusion of the factors it was required to consider under R.C. 3119.23 and for which evidence was presented. Accordingly, we sustain Mother's second assignment of error and hold that the trial court misapplied the law when it failed to consider all of the enumerated statutory factors contained in R.C. 3119.23 as were properly before the court in light the evidence presented.

MOTION FOR RELIEF FROM JUDGMENT

{¶19} In her final assignment of error, Mother argues that the trial court erred when it denied her motion for relief from judgment concerning the May 2008 agreement. Mother contends that due to her unanticipated loss of employment, it has become inequitable to continue

to apply the 80% downward deviation of Father's child support obligation to which the parties agreed in the May 2008 agreement. See Civ.R. 60(B)(4). Inasmuch as this Court is remanding for the trial court to correctly apply the law to Mother's motion to modify the May 2008 child support order, her appeal from the denial of the Civ.R. 60(B) motion for relief from that same May 2008 order is moot. See App.R. 12(A)(1)(c).

CONCLUSION

{¶20} In light of the above, we sustain Mother's first and second assignments of error concerning the trial court's ruling on her motion to modify the child support order. We conclude that Mother's third assignment of error with respect to the trial court's ruling on her motion for relief from judgment is moot and we decline to address it.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS

CARR, J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶21} I concur with the majority's resolution of the first assignment of error, but I respectfully dissent in regard to the second and third assignments of error.

{¶22} I would not reach the issue whether the trial court erred in deviating from the child support guidelines when it recalculated the amount of child support because our resolution of the first assignment of error reverses the trial court's child support award and therefore renders the second assignment of error moot.

{¶23} In regard to the third assignment of error, I would vacate the judgment appealed in case number 09CA009578 because it is a nullity, as the trial court lacked jurisdiction to issue the judgment. Mother's purported motion for relief from judgment was filed prior to the trial court's ruling on her objections, therefore, no final order yet existed to vacate. Accordingly, the motion for relief from judgment was effectively nothing more than a brief in support of her objections. The trial court's subsequent ruling on the motion is a nullity because it was an attempt to modify or supplement a final judgment.

APPEARANCES:

PAULETTE J. LILLY, Attorney at Law, for Appellant.

PATRICK D. RILEY, Attorney at Law, for Appellee.